

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36025

TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. & TEXAS CENTRAL  
RAILROAD, LLC—PETITION FOR EXEMPTION—PASSENGER RAIL LINE BETWEEN  
DALLAS AND HOUSTON, TEX.

Digest:<sup>1</sup> Texas Central Railroad and Infrastructure, Inc., and Texas Central Railroad, LLC (collectively, Texas Central), have filed a petition to reopen the Board's July 18, 2016 decision, which found that a proposed rail line between Dallas, Tex., and Houston, Tex., did not require Board approval. In this decision, the Board directs Texas Central to submit specific additional information that would assist the Board in considering Texas Central's petition to reopen and denies Texas Central's request for an oral argument at this time.

Decided: June 20, 2019

On May 4, 2018, Texas Central Railroad and Infrastructure, Inc. (TCRI), and Texas Central Railroad, LLC (TCRR) (collectively, Texas Central),<sup>2</sup> filed a petition to reopen this proceeding, alleging that substantially changed circumstances would materially affect the Board's decision served July 18, 2016 (July 2016 Decision). In that decision, the Board determined that construction and operation of a proposed rail line between Dallas, Tex., and Houston, Tex., would not require Board approval, finding it would be constructed and operated entirely within the State of Texas and would not be part of the interstate rail network. Numerous parties, as well as several federal and state officials, filed comments in support of<sup>3</sup> and in opposition to<sup>4</sup> Texas Central's project or petition to reopen.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> TCRI and TCRR are wholly owned subsidiaries of Texas Central Rail Holdings, LLC, which is a subsidiary of Texas Central Partners, LLC.

<sup>3</sup> U.S. Representatives Pete Sessions, Eddie Bernice Johnson, Al Green, John Carter, Marc Veasey, Sheila Jackson Lee, Gene Green, Ted Poe, Roger Williams, Kay Granger, Colin Allred, Lizzie Fletcher, Sylvia Garcia, Van Taylor, Lance Gooden, Bill Shuster, and Jeff Denham; Metropolitan Transit Authority of Harris County; Texas Rail Advocates; Rail Passenger Association/NARP; the National Railroad Passenger Corporation (Amtrak); and

(continued . . . )

In its May 4, 2018 petition, Texas Central states that it has entered into two new agreements with Amtrak: a Voluntary Coordination Agreement (VCA) and a Reservation and Ticketing Agreement (RTA). Under the VCA, according to Texas Central, the parties have agreed to work cooperatively in promoting through interstate passenger service on Amtrak and Texas Central trains. (Texas Central Pet. 2, May 4, 2018.) Texas Central states that the VCA provides for a variety of joint initiatives between Texas Central and Amtrak to promote and enhance through passenger travel on their respective lines, such as joint advertising in connection with special events and utilizing their respective frequent traveler programs. (*Id.* at 4, 6.) Texas Central further states that the RTA, which the parties entered into in furtherance of the VCA, would allow passengers to purchase a single through ticket for transportation on both the Texas Central and Amtrak portions of their journey. According to Texas Central, the single through ticket issued by Amtrak would include travel on a “connecting transfer service,” which would be operated by Texas Central, between the Amtrak and Texas Central stations in Dallas and Houston. (*Id.* at 5 (citing Ex. 2, VCA ¶ 6).)

Texas Central asserts that these agreements constitute substantially changed circumstances that materially affect the Board’s initial decision and requests that the Board reopen this proceeding and assert jurisdiction over the construction and operation of the Line. (Texas Central Pet. 4, May 4, 2018.) Texas Central argues that, through these agreements, both its operation of high-speed trains between Houston and Dallas and its provision of a connecting transfer service between the Texas Central and Amtrak stations would be “integral parts of an interstate through passenger service,” and thus “part of the interstate rail network” and subject to the Board’s jurisdiction under 49 U.S.C. § 10501. (Texas Central Pet. 6, May 4, 2018.)

In support of Texas Central’s petition, Amtrak asserts that the through ticketing arrangement would benefit Amtrak and its passengers by expanding the scope of its national network by “fill[ing] a major missing link in Amtrak’s national network: the Dallas/Fort Worth to Houston corridor.” (Amtrak Reply 6.)

Delta Troy and TAHSR, in opposition to the petition, contend that, among other things, the two new agreements do not contain an enforceable through ticketing provision; lack essential terms relating to scope, price, and duration of services; and do not require Texas Central to engage in through ticketing with Amtrak. (Delta Troy Reply 4-10, May 31, 2018; TAHSR Reply 12-13, May 31, 2018.) Delta Troy and TAHSR argue that, even if some form of through ticketing is found to exist, the proposed Line remains outside the Board’s jurisdiction because the project has no physical connection to Amtrak or other interstate railroads and is thus not part of the interstate rail network. (Delta Troy Reply 10-12, May 31, 2018; TAHSR Reply 7-12,

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( . . . continued)

numerous state and county officials and individual citizens submitted comments in support of Texas Central’s project or petition to reopen.

<sup>4</sup> U.S. Representatives Kevin Brady and Ron Wright; JBJQ Ranch; Texans Against High Speed Rail, Inc. (TAHSR); Delta Troy Interests, Ltd. (Delta Troy); and several individual citizens submitted comments in opposition to Texas Central’s project or petition to reopen.

May 31, 2018.) Several landowners whose properties would be directly impacted by the project also submitted comments in opposition to the petition. (See Parker Ltr., May 31, 2018; JBJQ Ranch Reply, May 24, 2018; K. Maretick Ltr., May 23, 2018; D. Maretick Ltr., May 21, 2018; Mannina Ltr., May 18, 2018; Whitesides Ltr., May 10, 2018.)

On June 12, 2018, Texas Central filed a surreply to its petition to reopen, asserting that the RTA is an enforceable agreement and that the Board's jurisdiction extends beyond rail lines physically connected to the interstate rail network.<sup>5</sup>

Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carriers (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is carried out "as part of the interstate rail network." See, e.g., DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914, slip op. at 9 (STB served May 7, 2010). Whether an intrastate passenger rail service is part of the interstate rail network is a fact-specific determination. See, e.g., Cal. High-Speed Rail Auth.—Construction Exemption—in Merced, Madera & Fresno Ctys., Cal., FD 35724, slip op. at 11-15 (STB served June 13, 2013) (with Board Member Begeman dissenting in part); All Aboard Fla.—Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla., FD 35680, slip op. at 3 (STB served Dec. 21, 2012) (with Board Member Mulvey dissenting).

*Supplemental Information.* Additional information is requested to assist the Board in considering Texas Central's petition to reopen. Specifically, the Board seeks the following:

1. Projections relating to annual passenger transfers in the first, fifth, and tenth full year of operation, including: the number and percentage of Amtrak passengers on the relevant Amtrak services who would transfer to the Texas Central service and the number and percentage of Texas Central passengers who would transfer to the relevant Amtrak services. Projections should be supported by a full description of the underlying methodologies, assumptions, and data sources, together with the data on which they are based, as well as Amtrak's written concurrence in the projections.
2. Details on the physical connection for any transferring passengers who may choose to walk between the Texas Central and Amtrak stations in Dallas, which, according to the petition, are approximately half a mile apart. (See Texas Central Surreply 9, June 20, 2016.) Please indicate what infrastructure would be available to a transfer passenger walking between the stations (e.g., a dedicated, connecting walkway or public sidewalks) and what, if any, arrangements would be made for transferring luggage?
3. Details pertaining to the proposed connecting transfer service between the Texas Central and Amtrak stations in Dallas (approximately half a mile apart) and Houston

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<sup>5</sup> Texas Central sought leave to file its response on June 12, 2018. That motion will be granted in the interest of a complete record.

- (approximately seven miles apart). For example, how frequently would any such service operate? Would the service adjust based on delays or schedule changes? Please also include projections concerning the average and maximum wait time for passengers transferring between Texas Central and Amtrak rail service by using the proposed connecting transfer service and by other means, including walking.
4. The most relevant legal support for finding jurisdiction over transportation by a rail carrier in the freight or passenger context that involves a complete break or gap in physical rail assets (e.g., track, yards, or property). For the passenger context, address all caselaw where a through-ticketing agreement was a factor in finding jurisdiction over the transportation of passengers by a rail carrier even though the transportation had a complete break or gap in the physical rail assets between it and Amtrak or another rail carrier moving passengers between a state and another state.
  5. Discussion of whether the proposed transfer service is similar to transfer, transload, or similar activities in the freight context that are, in some circumstances, subject to the Board's jurisdiction.

Texas Central shall submit the requested information by July 22, 2019.<sup>6</sup> Replies to the requested information will be due by August 9, 2019.

*Request for Oral Argument.* On March 19, 2019, Texas Central requested that the Board hold an oral argument “to assist the Board in sorting through the significant issues” raised in Texas Central’s petition “in a transparent and open process.” (Texas Central Request 2.)<sup>7</sup> The Board finds that further clarification of the material issues in this case can be presented and addressed through the written record and that oral argument is not currently necessary. Therefore, given that the Board directs Texas Central to submit specific additional information in the record, Texas Central’s request for an oral argument will be denied at this time.

*Application v. Petition.* Delta Troy and TAHSR argue that the Board should deny Texas Central’s petition for exemption and require a full application in light of questions surrounding the financial feasibility of the proposed rail project. (Delta Troy Reply 17-18, May 31, 2018; TAHSR Reply 15, May 31, 2018.)<sup>8</sup> Should the Board ultimately reopen the proceeding and find that this project falls within its jurisdiction, an application may be required, as discussed below.

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<sup>6</sup> The Board notes that Texas Central may file a request for an extension of time to provide the requested information, if needed.

<sup>7</sup> Comments in opposition to Texas Central’s request for an oral argument were filed by Delta Troy, TAHSR, Connie Shivers, and JBJQ Ranch.

<sup>8</sup> Delta Troy and TAHSR advanced similar arguments in 2016 in response to Texas Central’s petition for exemption. (Delta Troy Reply 12, May 31, 2016; TAHSR Reply 5, May 31, 2016.)

In support of their argument, Delta Troy and TAHSR note the increasing cost of the proposed project (which, according to Delta Troy, was originally estimated to cost over \$10 billion and is now projected to cost approximately \$16.5 billion), and raise questions regarding Texas Central's assertions regarding its funding sources for these costs, including the potential pursuit of public financing. (Delta Troy Reply 18, 22, May 31, 2018; TAHSR Reply 17-19, May 31, 2018.) Delta Troy and TAHSR raise further questions concerning the sufficiency and availability of funds for the project and argue that an application process would allow the Board to substantiate funding sources, consider the financial feasibility of the proposed project, and determine the financial fitness of Texas Central. (Delta Troy Reply 21-22, May 31, 2018; TAHSR Reply 15, 20-22, May 31, 2018; see also Delta Troy Reply 13-15, May 31, 2016; TAHSR Reply 10-13, May 31, 2016.)

In response to Delta Troy's and TAHSR arguments, Texas Central asserts that these arguments are irrelevant to its petition to reopen and can be addressed in the context of its petition for exemption, should the petition to reopen be granted. (Texas Central Surreply 11, June 21, 2018.) In 2016, in response to similar arguments made by Delta Troy and TAHSR, Texas Central argued that a full application is unnecessary, asserting that an exemption may be sought before outstanding issues, including those pertaining to the financing of the project, have been finalized. (Texas Central Reply 29, 32-33, June 20, 2016.) Texas Central asserted that the Board should reject objections to rail construction projects based upon the lack of finalized financing arrangements, arguing that the ultimate determination of the financial feasibility of a project will be made by the financial markets. (*Id.* at 32-33 (citing Dakota, Minn. & E. R.R. Constr. into the Powder River Basin, 3 S.T.B. 847, 892 (1998)).)

Under 49 U.S.C. § 10502, the Board must exempt a proposed rail line construction from the detailed application procedures of 49 U.S.C. § 10901 when the Board finds that: (1) those procedures are not necessary to carry out the rail transportation policy of § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. The Board has previously considered rail construction projects through the exemption process where the financial feasibility of the proposed line was uncertain, including in the high-speed passenger rail context. See Cal. High-Speed Rail Auth., FD 35724, slip op. at 29 (dissent of Board Member Begeman) (dissenting from the Board's decision to grant an exemption in lieu of the more thorough examination required by the application process, including projected costs and funding<sup>9</sup>); Ozark Mountain R.R.—Construction Exemption, FD 32204 (ICC served Dec. 15, 1994). However, in light of the questions raised in the current record, the Board notes that an application process may be necessary to carry out the rail transportation policy of § 10101, should the Board determine that

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<sup>9</sup> The Board notes that issues with the scope, costs, and funding of the California High-Speed Train System have arisen since the Board's 2013 finding of jurisdiction over the project, which was expected to link the State's largest passenger traffic generators, Los Angeles and San Francisco. See, e.g., Letter from Ronald L. Batory, Administrator of the Federal Railroad Administration, to California High Speed Rail Authority (May 16, 2019), <https://www.fra.dot.gov/eLib/Details/L20107> (concerning the termination of Cooperative Agreement No. FR-HSR-0118-12-01-01 and de-obligation of associated funds).

the project is subject to its jurisdiction. See 49 U.S.C. §§ 10101(4) (ensuring the development and continuation of a sound rail transportation system) & 10101(5) (fostering sound economic conditions in transportation).<sup>10</sup> An application here would provide the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the project that would assist the Board in considering the transportation merits of the project.<sup>11</sup> See Great Lakes Basin Transp., Inc.—Rail Construction & Operation—in Rock Cty., Wis., FD 35952, slip op. at 4 (STB served Aug. 31, 2017). Moreover, scrutiny under the application process may be appropriate given the magnitude of the project, the substantial public interest, and the potential impact on numerous, local-area landowners.

It is ordered:

1. Texas Central is directed to provide the supplemental information set forth in this decision by July 22, 2019. Replies to the requested information are due by August 9, 2019.
2. Texas Central's request for an oral argument is denied at this time.
3. Texas Central's motion for leave to file a response to replies is granted.
4. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

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<sup>10</sup> While the rail transportation policy includes reducing regulatory barriers to entry into the rail industry (§ 10101(7)), an application process here may ensure the continuation of a sound rail transportation system and foster sound economic conditions in transportation.

<sup>11</sup> Under 49 U.S.C. § 10901(c), the Board shall authorize construction and operation of railroad lines unless it finds that such activities are inconsistent with the public convenience and necessity.